Having read the grounds of decision I called for the depositions and for one exhibit in particular, namely, the certificate of the Government Chemist. That report, even without anything more, affords positive material corroboration of the complainant's evidence, and was either not read or understood by the Magistrate when he said there was "no evidence of seminal stains" on the complainant's clothing. Moreover spermatozoa were found in the vaginal swab. From time to time in the greater part of the grounds of decision the Magistrate himself posed questions indicating that he viewed with cynical scepticism the evidence of the complainant as to absence of consent. This appears to me to be pre-eminently a case of failing to see the wood for the trees. Surely the first question one must ask oneself is whether this woman, or any woman, would be a willing party to an act of intercourse with a complete stranger on the cement floor of her office during working hours?

I am satisfied that the learned Magistrate here was under a complete misapprehension as to the functions of a magistrate conducting a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, which he confused with the duties of a magistrate trying a case within his jurisdiction. He was in effect applying the provisions of section 173(f) of the Code as in a summary trial. The dicta of Bellamy J., in *Re Osman bin Abdullah* [2] has drawn a sufficiently clear line for magistrates to follow and I need not enlarge upon it. In a more recent decision of the Supreme Court of India, *Ramgopal Ganpatrai Ruia* v. *State of Bombay* [3] where it was stated that observations of the Indian Courts about the powers of a committing magistrate, appearing in conflicting reported cases, have to be read in the light of the facts and circumstances of each particular case, the Court went on to approve the decision of West J. in *Queen Empress* v. *Namdev Satvaji* [4] where he said:

> " What are 'sufficient grounds for committing' is not in any way defined, but it is manifest that they are not identical with grounds for convicting, since taken in that sense, the provisions would enable the Magistrate virtually to supersede the Court of Session to which the cognizance of the case for actual trial belongs. The true principle appears to be that expressed in the English statute. The Magistrate ought to commit when the evidence is enough to put the party on his trial, and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case."

I accordingly set aside the order of discharge, and direct that the Magistrate do frame a charge under section 376 of the Penal Code and commit the accused for trial thereon before the Court of a Judge.

*Order accordingly.*

## TAY CHONG BENG & ANOR. v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) December 3, 1962]

[K.L. — F.M. Criminal Appeal No. 33 of 1962]

*Penal Code, ss.109, 411 and 412 — Stolen property — Dishonestly receiving, in the commission of gang-robbery — Abetment — Accomplice — Corroboration — Evidence Ordinance, 1950, s.114, illustration (a).*

The 1st appellant was charged with dishonestly receiving stolen property to wit 315 sacks of tin ore in the commission of gang robbery under section 412 of the Penal Code. The 2nd appellant was charged with abetting the said offence punishable under sections 109 and 412 of the said Code. Both appellants were convicted by the learned trial judge. The 1st appellant was sentenced to 5 years' and the 2nd appellant to 4 years' imprisonment. Both appellants appealed against conviction. It was argued for the 1st appellant that (1) no *prima facie* case had been made out against him at the close of the prosecution case as there was no evidence that he received it or that he had knowledge that the offence in the course of which it had been stolen was the offence of gang robbery, (2) the trial judge misdirected himself on the question of burden of proof. It was argued for the 2nd appellant that the two robbers who gave evidence were accomplices and their evidence should not have been accepted without the learned trial judge administering to himself a caution as to the necessity for corroboration of their evidence in a material particular implicating the appellant.

**Held:** (1) at the close of the prosecution case the evidence against the 1st appellant if true was overwhelming and the learned trial judge had no option but to say that there was a case to answer;

(2) as the appellant did take actual possession of the ore and had control over it, that amounted to receiving the stolen ore. It was not necessary as a matter of law that he should have exclusive possession of the ore;

(3) the knowledge that the course by which it was stolen was gang robbery was presumed under section 114, illustration (a) of the Evidence Ordinance;

(4) the learned trial judge had not misdirected himself. His direction complied with what the Court of Appeal said in *Chan Chwee Kong* v. *Public Prosecutor* [6];

(5) the learned trial judge did warn himself that the two robbers were accomplices and that their evidence should be treated with great caution. In this case there was corroboration implicating the appellants.

*Cases referred to:—*

(1) *Gleed* 12 Cr. App. R. 32, 33.
(2) *Seiga* 45 Cr. App. R. 26, 30.
(3) *Berger* 11 Cr. App. R. 72, 74.
(4) *Wiley's Case* 4 Cox C.C. 414; (1850) 2 Den. 37.
(5) *Chandra Pal* v. *State* A.I.R. 1954 All. 684, 687.
(6) *Chan Chwee Kong* v. *Public Prosecutor* [1962] M.L.J. 307, 308.

COURT OF APPEAL (CRIMINAL).

*S. M. Yong* (*J. H. Yong* with him) for the 1st appellant.

*D. R. Seenivasagam* for the 2nd appellant.

*H. Sankey* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

**Thomson C.J.:** This appeal arose from an incident of a type which, though common elsewhere, is fortunately not yet very common in this country.

At about 5.30 a.m. on 9th December last, a Saturday, a lorry and trailer carrying 315 bags of tin ore worth about $54,000 left the Ipoh premises of the Straits Trading Company, a firm dealing in tin, for transport to the Butterworth smelting works. The ore was packed in bags of a distinctive type used by the company. When the lorry had gone some three miles it was stopped by six or seven men, at least some of whom were armed with knives. The driver and his mate were seized and blindfolded and forced into a car in which they were driven some way into a rubber estate where they were left after being threatened with personal injury if they did not remain there.

About 6 a.m. the lorry with its load of tin ore arrived back in Ipoh, this time at the premises of the Eastern Smelting Company, another company that deals in tin. It is not known who the driver was, but he was certainly not the original driver who was still sitting in the rubber estate where he had been taken.

When the lorry arrived at the Eastern Smelting Company's premises the first appellant was present. He was at that time the senior assistant to the Ipoh agent of the Eastern Smelting Company, he had been employed by the firm for about 14 years and he was clearly trusted to a very great extent with the day to day running of the firm's business in Ipoh. It is also clear that he is intimately acquainted with the tin dealing business in the Kinta Valley. He had with him a number of labourers employed by his firm and under his superintendence they emptied out the tin ore from its bags, mixed it with a quantity of inferior ore, which would have the effect of altering its assay value, weighed it and packed it in bags of the type used by the Eastern Smelting Company. It was entered in the books of that firm as coming from a number of small producers and was vouched for by Schedules as required by the Mineral Ores Enactment. These were false and had been obtained during the previous few days by the first appellant. Of the empty Straits Trading Company bags 90 were later handed by the first appellant to a friend and the balance have never been traced.

The tin ore was later sent by rail to the Eastern Smelting Company at Penang and the lorry was found abandoned in the outskirts of Ipoh.

Later on the morning of 9th December, that is to say after the tin ore had been dealt with as has been described, four cheques were prepared on the instructions of the first appellant. These were drawn by the Eastern Smelting Company in favour of the persons whose names appeared on the four false Schedules relating to the ore but made out to bearer. They amounted in all to $20,300. They were signed by the first appellant and by the chief clerk. They were all handed the same morning by the first appellant to the second appellant who had come to the premises of the Eastern Smelting Company and the second appellant then presented them before 11 a.m. for payment at the Ipoh branch of the Chartered Bank. He was paid $20,300 in cash, of which he retained $13,000 and paid $7,300 to the credit of his account.

The foregoing facts have never been at any time in any real dispute and in the circumstances it is not necessary to discuss in detail the evidence by which they were made out.

The two appellants were later arrested and were committed for trial and were tried together before Azmi J.

The charge against the first appellant was:—

"That you on or about the 9th day of December, 1961 at Eastern Smelting Godown, Conolly Road, Ipoh, in the State of Perak, dishonestly received stolen property, to wit, 315 sacks of tin ore valued at about $54,000 belonging to the Straits Trading Company, Ipoh knowing or having reason to believe that the possession of the said tin ore had been transferred by the commission of gang-robbery and that you thereby committed an offence punishable under section 412 of the Penal Code."

The charge against the second appellant was:—

"That you on or about the 9th day of December, 1961 at the Eastern Smelting Godown, Ipoh, in the State of Perak, abetted the commission of the offence of dishonestly receiving stolen property transferred by the commission of gang-robbery, to wit, 315 sacks of tin ore valued at about $54,000 belonging to the Straits Trading Company, Ipoh by Tay Chong Beng which was committed in consequence of your abetment and that you thereby committed an offence punishable under section 109 and section 412 of the Penal Code."

An application was made for separate trials but this was refused and nothing now turns on that.

At the trial each of the defendants gave a different version of the events of 9th December.

The story of the first appellant was that he had been approached by the second appellant to assist in a scheme to enable a friend to evade payment of tribute on tin ore which he was working on a tribute basis on land of which he was not the owner. The ore was to be delivered at the Eastern Smelting Company and was then with the assistance of the first appellant to be disposed of by the Eastern Smelting Company as if the Company had bought it from the individuals whose names appeared on the false Schedules. This would not only enable the miner in question, whose name was never mentioned, to swindle his landlord but would also assist him to defraud the income tax authorities. It was in pursuance of this arrangement that the ore was delivered and dealt with as described by the prosecution witnesses. This appellant also said that at the time of the delivery of the ore the second appellant was present.

This story was first told by the first appellant in a written statement which he voluntarily made to his employers on 27th December, more than two weeks after his arrest which took place on 11th December and which was produced by the prosecution as part of their case at the trial. At the trial he himself repeated it on oath in a somewhat elaborated version.

The story of the second appellant was different. He denied all knowledge of any dealing with the tin ore but said that on the morning of the 9th of December the first appellant rang him up and asked him to cash for him the cheques but to keep aside the sum of $7,300. He cashed the cheques and paid $13,000 to the first appellant and $7,300 to the credit of his own account. Nothing was heard of this story until the trial and then it was told in the form of an unsworn statement from the dock.

In the event each of the appellants was convicted for the offence charged against him. The first appellant was convicted for dishonestly receiving property stolen in the commission of a gang-robbery in contravention of section 412 of the Penal Code and the second appellant was convicted for abetment of that offence in contravention of sections 109 and 412. The first appellant was sentenced to 5 years' imprisonment and the second appellant to 4 years' imprisonment.

They appealed against their convictions and on 6th November, 1962, we disposed of the appeals.

In the case of the first appellant we quashed the conviction for receiving property stolen in the commission of a gang-robbery in contravention of section 412 of the Penal Code and substituted for it a conviction for receiving stolen property in contravention of section 411. In the case of the second appellant we set aside the conviction for abetment of receiving property stolen in the commission of a gang-robbery and substituted for it a conviction for abetment of receiving stolen property in contravention of sections 109 and 411. These alterations in the convictions made necessary alterations in the sentences imposed which were above the maximum permitted by section 411. In the case of the first appellant we imposed a sentence of three years' imprisonment and in addition a fine of $10,000 for which distress was to issue and in default of payment or distress we imposed a further period of imprisonment of nine months. In the case of the second appellant we imposed a sentence of three years' imprisonment and in addition a fine of $5,000 for which distress was to issue. In default of payment or distress we imposed a further sentence of six months' imprisonment.

We intimated that at a later stage we would give our reasons for the course we took and we now do so.

The appeals of the two appellants were based on different grounds and can most conveniently be dealt with separately.

The grounds of appeal of the first appellant were that in the first place at the close of the prosecution case no *prima facie* case had been made out against him and he should therefore have been discharged without being called on to make his defence and in the second place that at the conclusion of the case as a whole the trial Judge misdirected himself on the question of the burden of proof.

Now, putting aside for the moment two points of a somewhat technical nature to which we shall return, it seems to us that at the close of the prosecution case the evidence against this appellant if it was true was well-nigh overwhelming.

A lorry with a very large quantity of tin ore which was identifiable by reason not only of the bags in which it was packed but also by reason of its assay value was seized by force during the hours of darkness. Within a matter of minutes the ore was delivered at premises under the control of the appellant where the appellant was waiting to receive it and where he did receive it and with the aid of labourers whom he had provided proceeded to disguise it by altering its assay value and packing it in different bags. He then, with the aid of false documents, passed it through his employers' books as if it had come lawfully into his employers' possession and had it consigned by rail to the smelting works where its identity would have been completely destroyed. About four hours after the receipt of the ore he had received payment for it from his employers in the form of cheques which he handed to the second appellant. There was evidence, which we shall discuss in the case of the second appellant, that that man had actually assisted in the organisation of the robbery and that after receiving payment from the first appellant he made payments to two of the actual robbers. It is true that the first appellant had made a statement to his employers setting out what if it was believed, was an innocent explanation, that is innocent in the sense that it absolved him of knowledge of the true source of the ore and explained his own activities. But that statement was not made until a fortnight later and after he had been arrested and then released on bail and in any event it was not evidence of the facts set out in it. It was only evidence of the fact that it had been made.

In all the circumstances except on one point (to which I am coming) the learned trial Judge, in our view, had no option but to say that there was a case to answer; no reasonable man could have taken any other view.

It was, however, argued that even if at the close of the case for the prosecution the evidence made out that this appellant had organised the transmogrification of the Straits Trading Company ore into ore that was ostensibly the property of the Eastern Smelting Company and even if he knew that prior to the ore being brought to the Eastern Smelting Company's premises it had been dishonestly obtained, nevertheless the evidence did not make out that he had received it or that he had knowledge that the offence in the course of which it had been stolen was the offence of gang-robbery.

In our view the first of these points was entirely without substance. The argument was

that the appellant had never had the exclusive possession of the ore, indeed that he had never had possession of it at all, because possession passed directly from the actual robbers to the Eastern Smelting Company. The answer, of course, is that the appellant did take actual possession of the ore, although ostensibly as agent of the Eastern Smelting Company, and in any event it was not necessary as a matter of law that at any time exclusive possession should have been in him. The test of what amounts to receiving in this connection is thus stated in the case of *Gleed*:— [1]

"It is sufficient if the alleged receiver has had control over the stolen goods."

The latest discussion of the point is to be found in the case of *Seiga* [2] where Ashworth J. referred to the following passage from the case of *Berger* [3] where Lord Reading C.J. quoted with approval this passage from the judgment of Patteson J. in *Wiley's case* [4]:—

"I do not think it necessary that in order to constitute a man a receiver it is necessary that he should touch the goods, or that under certain circumstances a party having a joint possession with the thieves may not be convicted as a receiver; but, I think, to make a person liable as a receiver the goods must be under his control."

Lord Reading C.J. added:—

"That states the law accurately and in language which would be understood by the ordinary person who is not familiar with legal matters."

With regard to the question of knowledge, there is no doubt that the prosecution relied on the presumption set out in illustration (a) to section 114 of the Evidence Ordinance to the effect that a man who is in possession of stolen goods soon after a theft is either the thief or has received the goods knowing them to be stolen, unless he can account otherwise for his possession.

Now, there has been some difference of judicial opinion in the Indian courts as to whether the presumption arising by reason of section 114 can only extend to making out knowledge that the dishonest acquisition of goods consisted in simple theft or whether it can extend to making out knowledge of such an offence as gang-robbery (see *Chandra Pal* v. *State* [5]).

We do not find it necessary to consider that general question here. The presumption is not a mandatory one. It is one which a Court may make if it thinks it goes to show something that in view of the evidence before it is likely to have happened. The distinction in our law between robbery and what is called gang-robbery which is robbery by five or more persons, which springs from the strengthening of the law of India which was necessary in the last century to put down the crime of what is known there as dacoity, is a highly artificial one. Nevertheless the distinction is there and it must be observed and although in the present case the evidence afforded abundant justification for drawing the inference that the appellant knew the tin ore had been stolen and perhaps there was justification for inferring that he knew it had been stolen in the course of robbery, there was nothing which would justify imputing to him the knowledge that the theft or robbery had been committed by five or more persons rather than by less than five persons.

It is true that there is a finding by the trial Judge, which we accept, that there were more than five persons involved. That finding was based on the view he took, we think correctly, of the evidence of certain witnesses. There is, however, nothing whatever to suggest that the appellant must have formed the same view and it cannot be said that if he had taken the view that there were less than five persons involved that would have been in any way unreasonable, because after all four determined men can do a great deal and it is to be thought that the courage of the driver of the lorry and his mate was, like that of other people, at its lowest ebb in the hour before the dawn.

The other ground of appeal urged on behalf of the first appellant was that the trial Judge had misdirected himself as to the quantum and incidence of the burden of proof. For this complaint we can find no support. After discussing the prosecution evidence in very great detail the Judge went on to consider the first appellant's defence and he commenced his examination of it with the following words:—

"I will refer to the evidence of the 1st accused. I will call it his 'explanation' because it is the law that all that the accused has to do in this case is to raise a reasonable doubt in my mind as to the truth of his story; so if he has raised a reasonable doubt that the prosecution has failed to prove this knowledge, then, of course, he will be entitled to an acquittal."

In our view that is a correct statement and his Lordship is saying neither more nor less than what we said in the case of *Chan Chwee Kong* v. *Public Prosecutor*:— [6]

"In most criminal cases there is at some stage an onus of a sort upon the accused person. Once the prosecution produces evidence which if believed would support a conviction there is a tactical onus on the accused person either to produce evidence of his own or to point to something in the prosecution evidence that at the very lowest make the trier of fact less than sure of any conclusions he might otherwise be prepared to base upon the prosecution evidence. If he fails to discharge that tactical onus he will be convicted."

Turning now to the appeal of the second appellant, it is necessary to recapitulate the evidence which implicated him.

Putting aside the voluntary statement and the sworn evidence of the first appellant, that evidence consisted of the evidence that a few hours after the commission of the robbery the first appellant, whose receiving of the stolen property he was charged with abetting, had handed him cheques for the money which had been paid by the Eastern Smelting Company in respect of the stolen ore and that he had cashed those cheques. In addition there was the evidence of two men who said they had actually

assisted in the commission of the robbery. One of them, Chan Fook Wah, said he had been recruited to take part in the robbery by one Ah Wai and he then proceeded to give an account of the actual robbery which corresponded very closely to the account given by the driver and his mate. About mid-day on the same day, that is to say half an hour after the latest time at which the cheques could have been cashed on a Saturday, Ah Wai came to his house in an inner suburb of Ipoh with the second appellant who had a bundle under his arm. The second appellant put down the bundle and went away.

This man's brother, Chan Tong Wah, also said he was engaged by Ah Wai to take part in the robbery and did so by patrolling the road on a motor-cycle keeping a lookout for Police cars. He said that on the Saturday morning some time after 11 a.m. he was in his brother's house with his brother when Ah Wai and the second appellant came in. The second appellant was carrying a parcel which he left on a table. Both these people left and later Ah Wai came back alone and opened the parcel which the second appellant had left which contained a sum of money in $10 notes. From this Ah Wai gave him $500 for himself for his trouble and a further $1,000 for safe keeping. Four days later the Police searched this witness's house and found the sum of $1,520 of which the witness said $20 was his own.

Clearly, if it was believed, this evidence made out that the second appellant was connected with the robbery. To what extent that connection can be taken may be a matter for argument but it certainly amounted at the very lowest to abetment of the receiving of the stolen property by the first appellant. The only ground on which this conclusion was attacked before us was that the two robbers who gave evidence were accomplices and their evidence should not have been accepted without the trial Judge administering to himself a caution as to the necessity for corroboration of their evidence in a material particular implicating the appellant. One answer to this is that the trial Judge did warn himself that they were accomplices and did warn himself that their evidence must be treated with great caution. The second answer is that there was corroboration implicating the appellant and that corroboration was to be found in the fact that a few hours after the commission of the robbery and an hour or so prior to the alleged visit with Ah Wai to the house of Chan Fook Wah the second appellant had come into possession of a large quantity of money which was the proceeds of the stolen property.

For the foregoing reasons we were compelled to the view that there were no grounds on which this Court could interfere with the conclusions of the trial Judge that the first appellant had received the property which was stolen in the course of the robbery of the tin while knowing the tin to have been stolen or having reason to believe that the tin was stolen and that the second appellant abetted him in the commission of that offence.

As, however, we were of the opinion that there was no evidence to support the inference that the first appellant knew that the theft of the tin took place in the course of a robbery which amounted to gang-robbery we were compelled to alter his conviction to one under section 411 and as the second appellant was charged not as a principal and not with conspiracy or anything of the sort but with abetment it followed that his conviction must be varied accordingly.

*Appeal dismissed — Convictions altered.*

Solicitors: *S. M. Yong & Co.; S. Seenivasagam & Sons.*

## PUBLIC PROSECUTOR v. MOHD. ISA

[A. Cr. J. (Thomson C.J.) November 2, 1962]

[K.L. — Selangor Criminal Appeal No. 55 of 1962]

*Road traffic — Permitting unlicensed person to drive motor-cycle while insurance policy not in force — Magistrate imposing fines — No disqualification of driving licence — Whether "special reasons" exist — Road Traffic Ordinance, 1958, ss.25, 74.*

The respondent was convicted on his plea of guilty on a charge of permitting an unlicensed person to drive his motor-cycle and of allowing his motor-cycle to be used while an insurance policy was not in force in contravention of sections 25(2) and 74 of the Road Traffic Ordinance. He was fined $10 on the first charge and $20 on the second charge. The Magistrate refrained from making an order relating to his driving licence on the grounds that the respondent required the use of his motor-cycle to get to his place of work; that he had many dependants to support and that he was a sick man. The Public Prosecutor appealed against the sentences on the ground that they were inadequate.

**Held:** (1) the fines were inadequate;

(2) the special reasons mentioned in section 74 of the Ordinance are not special reasons connected with the offender but special reasons connected with the commission of the offence. In this case as the special reasons mentioned by the learned Magistrate were special reasons connected with the offender the disqualification mentioned in the section must be imposed.

Where an order for disqualification is made, except in serious cases of being drunk in charge or dangerous driving, the quantum of the monetary penalty is of minor importance.

"Reasons special to the offender" and "reasons special to the offence" explained.

*Cases referred to:—*

(1) *Public Prosecutor* v. *Yap Hon Min* Selangor Criminal Appeal No. 4 of 1960 (to be reported in 3 M.C.).

(2) *Whittall* v. *Kirby* [1947] K.B. 194.

MAGISTRATE'S CRIMINAL APPEAL.

*H. R. Sankey* (Deputy Public Prosecutor) for the appellant.

Respondent in person.

**Thomson C.J.** (delivering oral judgment): This is an appeal by the Public Prosecutor against a decision of the Magistrate at Kuala Lumpur.

The respondent was convicted on his own plea of guilty on a charge of permitting an un-